



Order 2008-4-7

UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Issued by the Department of Transportation  
on the 4<sup>th</sup> day of April, 2008

Served: April 4, 2008

Applications of

**VIRGIN NIGERIA AIRWAYS LIMITED**

for an exemption under 49 U.S.C. §40109 and  
a foreign air carrier permit under 49 U.S.C. §41301

Dockets DOT-OST-2005-23460  
DOT-OST-2005-23461

**ORDER GRANTING EXEMPTION AND TO SHOW CAUSE**

**Summary**

By this order we grant the application of Virgin Nigeria Airways Limited (Virgin Nigeria) for an exemption under 49 U.S.C. §40109, subject to conditions.<sup>1</sup> We also tentatively find that it is in the public interest to grant the applicant the foreign air carrier permit attached as Appendix B to this order.

**Background**

On August 23, 2005, the Department issued a Notice, in Docket OST-2005-22228, announcing several steps designed to streamline our regulatory procedures for licensing U.S. and foreign air carriers. Among other things, the Notice stated that:

Assuming, based on the record and on the public interest/public convenience and necessity elements germane to our licensing decisions, that we were in a position to act favorably, we would proceed to issue a single order (1) granting the exemption request for whatever duration we would normally have imposed, or until certificate/permit authority becomes effective, whichever is shorter, and (2) tentatively deciding (*i.e.*, show-cause) to award a corresponding certificate (or permit), again for the standard duration we would normally have imposed (such as,

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<sup>1</sup> The conditions are attached at Appendix A.

in the case of certificates, five years for limited-entry markets, indefinite for open-entry markets, and in the case of permits, five years for comity and reciprocity regimes, indefinite for agreement regimes).

Our action in this Order serves to implement these streamlined regulatory procedures for the applications involved in this proceeding.

### **Application**

By applications filed December 22, 2005, as amended and supplemented, Virgin Nigeria, a foreign air carrier of Nigeria, requests an exemption under 49 U.S.C. §40109, and a foreign air carrier permit under 49 U.S.C. §41301, to engage in (1) scheduled foreign air transportation of persons, property and mail from points behind Nigeria, via Nigeria and intermediate points, to a point or points in the United States, and beyond; and, for all-cargo services, between the United States and any point or points; and (2) charter foreign air transportation in accordance with the U.S.-Nigeria Air Transport Agreement and the Department's regulations governing charters. The carrier proposes to conduct these operations using aircraft wet leased from a duly authorized and properly supervised U.S. or foreign air carrier, or through a code-share arrangement with such a carrier.

The applicant provided evidentiary materials required by 14 CFR Part 211 of our regulations to support its request for a foreign air carrier permit.

### **Responsive Pleadings**

On January 6, 2006, Continental Airlines, Inc., and Federal Express Corporation filed answers in opposition to Virgin Nigeria's applications.<sup>2</sup> Continental and Virgin Nigeria each also filed a reply and a surreply.<sup>3</sup>

Continental and Federal Express stated that, based on the record, Virgin Nigeria appeared to be controlled by Virgin Atlantic Airways Limited, a foreign air carrier of the United Kingdom. Federal Express stated that such a situation would give Virgin Atlantic benefits beyond those available to a carrier of the United Kingdom under the then-effective U.S.-U.K. Air Services Agreement.

Continental also stated that it had attempted, in 2004, to obtain authority from the Government of Nigeria to operate bilaterally-agreed services in the U.S.-Nigeria market, and that the Nigerian authorities had not acted on its request.

On May 24, 2007, Virgin Nigeria filed a supplement to its application, stating, among other things, that since the time of its original application and the above-referenced responsive

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<sup>2</sup> American Airlines, Inc. and North American Airlines, Inc. also filed answers, but subsequently withdrew their answers.

<sup>3</sup> Continental and Virgin Nigeria accompanied their surreplies with motions for leave to file. Good cause having been shown, we will grant these motions.

pleadings, the United States and the European Union had entered into a new aviation agreement which contains provisions that effectively remove the issue of U.K. ownership as a possible bar to the approval of its applications in this proceeding.

## **Decision**

We have decided, under assigned authority and consistent with our August 23, 2005 Notice referenced above, to grant the applicant's request for exemption authority, as described below and subject to conditions, and tentatively to grant, subject to show-cause procedures, its request for a foreign air carrier permit, also subject to conditions.

With respect to the applicant's request for exemption authority, we find that grant of this authority is consistent with the public interest; and that the applicant has demonstrated, based on the record, that it is financially and operationally qualified to perform the services authorized.

With respect to the ownership and control of Virgin Nigeria, the record indicates that 51 percent of the shares of the applicant are owned by citizens of Nigeria, with the remaining shares held by Virgin Atlantic Airways, a U.K. carrier. Of the eleven members of Virgin Nigeria's Board of Directors, six are Nigerian citizens, four are U.K. citizens, and one is a citizen of South Africa. Virgin Nigeria's Chief Executive Officer, Chief Operating Officer, Chief Commercial Officer, and several other key management officials are U.K. citizens.

Based on the record, we are unable to find that the applicant is substantially owned and effectively controlled by citizens of Nigeria. However, we find that a waiver of our ownership and control standard is warranted in this instance, as there is nothing in the ownership and control of Virgin Nigeria that would be inimical to U.S. aviation policies and interests. In particular, the new U.S.-EU Air Transport Agreement, which entered into provisional application on March 30, 2008, removes restrictions that previously affected U.S. carriers under the U.S.-U.K. Air Services Agreement. Further, the new U.S.-EU Agreement contains provisions stating that:

1. Neither Party shall exercise any available rights under air services arrangements with a third country to refuse, revoke, suspend or limit authorizations or permissions for any airlines of that third country on the grounds that substantial ownership of that airline is vested in the other Party, its nationals, or both.
2. The United States shall not exercise any available rights under air services arrangements to refuse, revoke, suspend or limit authorizations or permissions for any airline of...any country in Africa that is implementing an Open-Skies air services agreement with the United States as of the date of signature of this Agreement, on the grounds that effective control of that airline is vested in a Member State or States, nationals of such a state or states, or both.<sup>4</sup>

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<sup>4</sup> See U.S.-EU Air Transport Agreement, Annex 4, Article 2.

Thus, the U.S.-EU Agreement provides for nationals of the United Kingdom (an EU Member State) to engage in the kind of third-country ownership and control at issue here.

In addition, the authority sought by the applicant is encompassed by the aviation agreement between the United States and Nigeria. We therefore find that grant of the requested exemption authority for a two year term, or until the requested permit becomes effective, whichever occurs earlier, is warranted.

With respect to the concerns raised by Continental and Federal Express, related to the involvement of Virgin Atlantic Airways, they have been addressed by the U.S.-EU Agreement, as noted above.

With respect to the concerns raised by Continental concerning the earlier inaction by the Government of Nigeria on its application to serve Nigeria, we have received assurances from the Government of Nigeria that it is prepared to approve requests by U.S. carriers for authority to serve Nigeria under the U.S.-Nigeria Agreement.<sup>5</sup>

Finally, we note that the applicant is properly licensed by its homeland to perform the proposed services. We have verified the applicant's compliance with 14 CFR Part 203 (Warsaw liability waiver).<sup>6</sup>

### **Tentative Findings and Conclusions--Foreign Air Carrier Permit Application**

We tentatively find and conclude that the public interest warrants granting the applicant a foreign air carrier permit, in the form attached as Appendix B and subject to the conditions attached.<sup>7</sup> In particular, we tentatively find and conclude that the factors which support our grant of exemption authority to the applicant also warrant granting the applicant the foreign air carrier permit it seeks.

In view of the foregoing and all facts of record, we tentatively find and conclude that:

1. It is in the public interest to issue the applicant a foreign air carrier permit in the form attached;
2. The applicant is fit, willing and able properly to perform the foreign air transportation described in the attached permit and to conform to the provisions of Title 49 of the U.S. Code, and to our rules, regulations, and requirements;

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<sup>5</sup> We note that the Government of Nigeria has acted favorably on applications by American Airlines and North American Airlines for authority under the U.S.-Nigeria Agreement.

<sup>6</sup> Prior to commencing operations under this authority, Virgin Nigeria must file evidence of insurance coverage under 14 CFR Part 205 of the Department's regulations (*see* Condition 3 of Appendix A).

<sup>7</sup> The applicant's request for a foreign air carrier permit was summarized in the Department's published weekly list of applications filed. This notice described the authority sought and gave interested persons an opportunity to submit evidence and objections to the award of this foreign air carrier permit authority.

3. A waiver of our ownership and control standard is warranted in the circumstances presented;
4. The public interest requires that the exercise of the privileges granted by the permit should be subject to the terms, conditions, and limitations contained in the attached permit, and to such other reasonable terms, conditions, and limitations required by the public interest as we may prescribe;
5. The public interest does not require an oral evidentiary hearing on the application; and
6. Our action with respect to this foreign air carrier permit should, unless disapproved by the President of the United States under §41307 of Title 49 of the U.S. Code, become effective on the 61st day after its submission for §41307 review, or upon the date of receipt of advice from the President or his designee under Executive Order 12597 and implementing regulations that he or she does not intend to disapprove this portion of the Department's decision under that section, whichever occurs earlier.

In view of the above, and acting under authority assigned by the Department in its regulations, 14 CFR Part 385, we find that (1) our actions are consistent with Department policy; and (2) with respect to the exemption authority we are conferring on the applicant, the applicant is qualified to perform those operations.<sup>8</sup>

#### **ACCORDINGLY,**

1. We grant the request of Virgin Nigeria Airways Limited for an exemption under 49 U.S.C. §40109 to permit it to engage in (1) scheduled foreign air transportation of persons, property and mail from a point or points behind Nigeria, via Nigeria and intermediate points, to a point or points in the United States, and beyond; and, for all-cargo services, between the United States and any point or points; and (2) charter foreign air transportation of persons, property and mail in accordance with the U.S.-Nigeria Air Transport Agreement and the Department's regulations governing charters;
2. The exercise of the privileges granted above is subject to compliance by Virgin Nigeria Airways Limited with the conditions listed in Appendix A;
3. In the conduct of the operations authorized, Virgin Nigeria Airways Limited may only use aircraft wet leased from a duly authorized and properly supervised U.S. or foreign air carrier

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<sup>8</sup> The applicant states that the introduction of its services will result in a near-term annual change in fuel consumption exceeding 10 million gallons. Under the provisions of the Energy Policy and Conservation Act of 1975 and 14 CFR Part 313 of our rules, we have considered the matter of Virgin Nigeria's anticipated fuel consumption along with the other public interest factors we consider in taking action in a proceeding of this kind. We find, in the circumstances presented, that in view of our obligations under 49 U.S.C. 40105 to act consistently with international agreements (in this case, the U.S.-Nigeria Air Transport Agreement), and the public benefits that will be derived from Virgin Nigeria's services, approval of the request notwithstanding the anticipated level of fuel consumption is warranted.

(or operate through a code-share arrangement with such a carrier, where Virgin Nigeria is not physically operating the flight);

4. Our action granting the exemption authority described herein is effective immediately, for a period of two years from the issue date of this order, or until the attached permit becomes effective, whichever is earlier;

5. We grant all motions requesting leave to file documents;

6. We may amend, modify, or revoke our action regarding the exemption authority set forth in ordering paragraph 1 at our discretion at any time and without hearing;

7. To the extent not acted upon above, we dismiss the applicant's request for exemption authority in Docket DOT-OST-2005-23460;

8. With respect to the applicant's request for a foreign air carrier permit in this proceeding, we direct all interested persons to show cause why our tentative decision on that application, set forth above, should not be made final;

9. Any interested person objecting to the issuance of an order making final our tentative findings and conclusions with respect to the applicant's request for a foreign air carrier permit shall, no later than twenty-one (21) calendar days after the date of service of this order, file with the Department and serve on the parties to this proceeding, a statement of objections specifying the part or parts of the tentative findings and conclusions objected to, together with a summary of testimony, statistical data, and concrete evidence to be relied upon in support of the objections; if objections are filed, answers to objections are due no later than seven (7) calendar days thereafter;

10. If timely and properly supported objections are filed, we will give further consideration to the matters and issues raised by the objections before we take further action;

11. In the event no objections are filed, all further procedural steps shall be deemed waived, and the Department will enter an order which will (subject to Presidential review under §41307 of Title 49 of the U.S. Code) make final our tentative findings and conclusions set forth in this order; and

12. We will serve a copy of this order on Virgin Nigeria Airways Limited; American Airlines, Inc.; Continental Airlines, Inc.; Federal Express Corporation; North American Airlines, Inc.; the Embassy of Nigeria in Washington, D.C.; the Department of State; and the Federal Aviation Administration.

Persons entitled to petition the Department for review of this order under the Department's regulations, 14 CFR §385.30, may file their petitions within seven (7) days after the date of

issuance of this order. Our action with respect to the applicant's request for exemption authority under 49 U.S.C. §40109 is effective immediately, and the filing of a petition for review will not alter such effectiveness.

By:

PAUL L. GRETCH  
Director  
Office of International Aviation

(SEAL)

Appendices

*An electronic version of this document is available on the World Wide Web at:  
<http://www.regulations.gov>*

## Foreign Air Carrier Exemption Conditions

## Appendix A

In the conduct of the operations authorized, the foreign carrier applicant shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, the Transportation Security Administration, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 14 CFR Parts 129, 91, and 36 and 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Industry Representative (IIR) (formerly referred to as International Principal Security Inspector) to advise the IIR of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.



Issued by  
Order 2008-



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

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PERMIT TO FOREIGN AIR CARRIER  
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**Virgin Nigeria Airways Limited**

A Foreign Air Carrier of Nigeria

is authorized, subject to the following provisions, the provisions of Title 49 of the U.S. Code, and the orders, rules, and regulations of the Department of Transportation, to engage in scheduled foreign air transportation of persons, property and mail, as follows:

**From a point or points behind Nigeria, via Nigeria and intermediate points, to a point or points in the United States, and beyond; and, for all-cargo services, between the United States and any point or points**

The holder is also authorized to engage in charter foreign air transportation of persons, property and mail in accordance with the U.S.-Nigeria Air Transport Agreement and the Department's regulations governing charters.

This permit and the exercise of the privileges granted in it shall be subject to the terms, conditions and limitations in both the order issuing this permit and the attachment to this order, and to all applicable provisions of any treaty, convention or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and the holder's homeland are or shall become parties.

In addition, the holder, in exercising the privileges granted in this permit, may only use aircraft wet leased from a duly authorized and properly supervised U.S. or foreign air carrier (or operate through a code-share arrangement with such a carrier, where the holder is not physically operating the flight), unless the Department has removed this condition by subsequent Order;

This permit shall be effective on . Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention or agreement, this permit shall terminate (1) upon the dissolution or liquidation of the holder to whom it was issued; (2) upon the effective date of any treaty, convention, or agreement or amendment, which shall have the effect of eliminating the bilateral right for the service authorized by this permit from the service which may be operated by airlines designated by the Government of Nigeria (or, if the right is

partially eliminated, then the authority of this permit shall terminate in like part); (3) upon the effective date of any permit granted by the Department to any other carrier designated by the Government of Nigeria in lieu of the holder; or (4) upon the termination or expiration of the applicable air services agreement between the United States and Nigeria. However, clause (4) of this paragraph shall not apply if prior to such termination or expiration, the foreign air transportation authorized herein becomes the subject of another treaty, convention or agreement to which the United States and Nigeria become parties.

The Department of Transportation has executed this permit and affixed its seal on  
, 2008.

By:

PAUL L. GRETCH  
Director  
Office of International Aviation

(SEAL)

## **Foreign Air Carrier Permit Conditions**

In the conduct of the operations authorized, the foreign carrier applicant shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, the Transportation Security Administration, and with all applicable U.S. Government requirements concerning security, including, but not limited to, 14 CFR Parts 129, 91, and 36 and 49 CFR Part 1546 or 1550, as applicable. To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) from a foreign airport that would be the holder's last point of departure for the United States, contact its International Industry Representative (IIR) (formerly referred to as International Principal Security Inspector) to advise the IIR of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are: (a) based on its operations in international air transportation that, according to the contract of carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or (b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States. In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;
- (8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;
- (9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;
- (10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and
- (11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code.